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Certified Public Accountants

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Tuesday, December 03, 2013

Megan Moore

Revenue and Transportation Interim Committee Staff
Helena, MT 59601

RE: MDOR Appeals Process

Dear Ms. Moore:

Thank you for the opportunity to suggest to the Interim Committee procedural and internal changes to the income tax appeals process for its consideration. As a Montana CPA since 1979, my relationship with MDOR had been largely congenial and cooperative until 2004. Some eight years ago the dynamic changed when the Department became contentious in its interactions with my clients during their audits and, subsequently, on appeals up to the Montana State Tax Appeal Board.

The Problems for Committee Consideration

Two audits where I represented my clients resulted in the dismissal of MDOR employees who violated the clients' constitutional rights to due process and privacy, respectively. In one case, the auditor threatened to audit my client's parents if we chose to appeal his audit findings. In the hearing he attempted to avoid stating on the record when asked in several ways whether or not he had made such a threat. However, in an unguarded moment, the auditor actually admitted to the Hearing Officer that he did in fact make such a threat. Remarkably the Hearing Officer dismissed my client's argument stating in his opinion that there was no clear and convincing evidence that the auditor had made such a threat.

On appeal to the Tax Court, we were told in a pre-trial meeting by a member of the State Tax Appeal Board that our case was petty by comparison to the multi-million dollar property tax cases that was scheduled for hearing. I was floored at the insensitivity of the Board to my client's appeal rights. In our favor we had an IRS audit confirming our position on travel expenses for the same years audited by MDOR which had been denied by the MDOR auditor and the Hearings Officer on appeal. The IRS auditor commented that the documentation provided to him was exceptional. We settled with the department but at great expenditure of time and treasure incurred by my client for which I am still receiving monthly

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payments. As I told the MDOR attorney at the time of the settlement, we had just reached an agreement to a proposal similar to what I had proposed to the auditor three years before. Can you understand how this process was perceived by my client to be unfair and contrary to the promises in the MDOR Mission Statement? It struck us that the auditor and State Tax Appeal Board acted as if my client was expected to work for them when, in fact, these people are employed by the State of Montana to work for him.

In the second case, a different MDOR auditor and I reached another understanding on the deductibility of my client's travel expenses. However, after the agreement and without my client's permission, the auditor contacted the taxpayer's employer and quizzed him about the nature and extent of the employee reimbursement policies with an eye to denying more deductions than agreed. When I confronted the auditor he admitted doing so and was unapologetic. I referred the matter to the Office of Taxpayer Assistance which resulted in a reversal by the auditor. He agreed to all terms that we reached earlier for settling the audit. Later, he was replaced by another auditor in a separate case we had been working on. I assumed he had been fired for violating my client's privacy rights. Was MDOR fair to my taxpayer consistent with the promise of the MDOR Mission Statement? In our view, at the auditor level that was not the case. Fortunately, there is now oversight and an issue that could have cost my client thousands of dollars in appeals was addressed by the Office of Taxpayer Assistance and we were able to extricate the taxpayer at a reasonable cost.

I am old enough to have followed the history of the Montana Energy Credit from its inception. It has evolved from a liberal interpretation of a law written by the Legislature and administered by a Republican Governor as an answer to the anticipated rising energy costs to Montana taxpayers from the privatization of Montana Power Company. Today it is administered by a Democratic Governor as a tax credit with limited application that has been denied to taxpayers on audit as the Department willy-nilly rewrites regulations in contravention to the law's original intent. As a result of MDOR administrative rules the credit available to taxpayers has screwed down the allowable energy conservation assets eligible for the credit to a point where even allowed federal energy asset investments, like reflective metal roofing, are denied by the state.

Two years ago, the MDOR auditors were allowing the credit for insulated garage doors on attached garages. Then, due to a decision in a private case which has remained secret, the Hearings Officer determined that the insulated garage doors were no longer eligible. The only reason this came to light was that I was the taxpayer audited the year before the decision who was allowed the credit for my insulated garage door installation on appeal and, to me, this new ruling made no sense. How is it that a multibillion dollar industry in insulated garage doors flourishes with energy savings and the Department, in partnership with the Department of Environmental Quality keeps coming up with lame excuses for denying the credits? Worse, we can't argue the matter with the Department because they now have an internal ruling, not subject to oversight by a disinterested third party. Who is going to spend \$10,000 or more to appeal an energy credit injustice that saves the \$1,000 credit? Professionally, I would be violating professional standards to recommend that the client appeal in that circumstance.

My partner, C. James Helseth, complains that Montanans are paying for the dams we drive by in Great Falls for a second time because MPC was deregulated. Now, with the proposed sales of the power company to another power company, Montanans get to buy the dams a third time. And, as our energy costs go up, our energy credits keep going down because the appeals system is flawed.

Suggested Solutions for Committee Consideration

1. **Change the Tone at the Top/Fine the Department.** In our Peer Review Committee for the Montana Society of CPAs it is clear that quality firm work depends on a commitment to those values at the top of the CPA firm. For there to be taxpayer fairness as promised in the MDOR Mission Statement, the Director has to commit to instituting measures to assure that fairness prevails at all levels of the audit appeals process. These measures should include monetary penalties payable to taxpayers for violation of their constitutional rights like the rights to privacy and due process denied to my clients. My clients, referred to in the examples above, paid my firm and an attorney, over \$8,000 to chase unnecessary audit results up the appeals chain. The purpose of the internal appeals process is to compromise reasonable positions. However, when auditors become like insurance adjusters and simply deny legitimate, adequately documented taxpayer claims and the appeals officer ignores clearly presented testimony and documentation, the Department should be sanctioned for the full out of pocket costs suffered by the taxpayer.
2. **Auditor Employment Not Contingent Upon Tax Deficiency Findings.** It is a dirty little secret that the MDOR auditors, while not specifically subject to quotas, are incentivized by their supervisors in the audit department to threats of dismissal if their income tax collections do not rise to certain levels. The history of the past eight years shows that auditors will take contrary positions regardless of the merits of the taxpayer's case because of that pressure. Supervisors who directly or obliquely suggest or state that auditor employment is contingent on anything other than a fair interpretation of the law should be disciplined with suspension for a week without pay. In addition, should the auditors under their purview be sanctioned for violation of a taxpayer's rights, the supervisors should be disciplined with the same sanctions suffered by the auditors. Travel expenses properly documented under the reasonable man standard should not be stone walled by auditors to make some imagined or real quota. Respect for due process rights should be the norm not the exception.
3. **Hire a Tax Attorney to Serve as the Dispute Resolution Officer with Offices Off-Premises from MDOR.** The cozy relationship between the auditors and the Hearings Officer resulted in numerous biased and clearly wrong decisions in at least two of my client's appeals, in my opinion. An experienced Tax Attorney conversant in Montana and US Federal Income Tax Law operating as the Hearings Officer outside of MDOR reduces the likelihood that incompetent, biased decisions will be made which overturn tax law precedent for which there is broad consensus among CPAs, tax return preparers and lawyers.
4. **Allow CPAs to Depose Witnesses and Discover Documents At the State Tax Appeal Board by Passing Enabling Legislation.** The increased cost of hiring attorneys to replace CPAs representing taxpayers before the State Tax Appeal Board was enabled when the current Board ruled CPAs may not practice before it. The result, due to the exorbitant cost of hiring attorneys

for such appeals, has had a chilling effect on taxpayers making legitimate appeals of clearly stonewalled Department decisions. Taxpayers will not pay an attorney to challenge the MDOR's denial of deductions that amount to a few thousand dollars when it costs \$5,000 to hire the attorney just to file the motions with the Board. Is that the fairness promised to taxpayers in the MDOR Mission Statement?

5. **Allow Only Attorneys and CPAs With Tax Experience to Sit on the State Tax Appeal Board as Members.** It is clear to me that MDOR attorneys and auditors, as well as, CPAs are often left scratching their heads in wonder about the decisions that come down from the present members of the Board. Many decisions are contrary to what might be considered to be generally accepted tax law and can be clearly inconsistent with similarly situated cases. CPAs and MDOR could probably agree that we need more competent members to write the opinions and be consistent with precedent as they rule on these cases just like real judges do.
6. **Subject All Administrative Rules to Legislative Oversight and Permit the Office of Dispute Resolution to Rule on the Constitutionality of the Rules.** It is clear that the Department is writing administrative rules in contravention to many Montana Supreme Court Decisions. These decisions state without equivocation that the administrative rules may only be written to enable the Laws passed by the Legislature. These rules may not limit or obstruct the Law as written in anyway. No one elected MDOR employees to the Legislature and they should not be writing laws that please them in contrast to the laws as written. Apparently, MDOR won't let that inconvenient fact stop them. Perhaps, an independent attorney acting as the Hearing Officer in the Office of Dispute Resolution with the power over see these rules would better protect the Legislature's interest in preserving the powers reserved to it in the Constitution.

In conclusion, please excuse my obscure reference to our current Pope as it applies to your task. Pope Francis writes that he does not want a church caught up in a web of obsessions and procedures within rules that make harsh judges, within habits that make the hierarchy feel safe, while at our door people are starving. Montanans do not want an appeals system caught up in arcane administrative rules subject to gaming by its players which make harsh rulers of its administrators while at the door of a State Government, which is of, by and for the people, the taxpayers are unfairly cheated.

Respectfully,



John E. Myers SPA CMA CFF

Cc: Jane Egan